



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

March 19, 2003

Ms. Angela M. DeLuca
Assistant City Attorney
City of College Station
P. O. Box 9960
College Station, Texas 77842

OR2003-1875

Dear Ms. DeLuca:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178336.

The College Station Police Department (the "department") received a request for all emails sent or received on police patrol unit mobile computers during a certain time period. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. The department claims that the requested information is confidential under article 39.14 of the Code of Criminal Procedure. The department argues that under article 39.14, "the requested information is not available to criminal defense counsel except in cases where good cause and materiality is shown under the discovery provisions." Article 39.14 of the Code of Criminal Procedure governs the discovery of information and the testimony of witnesses in criminal proceedings. *See* Code Crim. Proc. art. 39.14. Discovery privileges are not covered under section 552.101 of the Government Code. Open Records Decision No. 575 (1990); *see* Gov't Code §§ 552.005, .006. Further, we find that article 39.14 does not make the requested information confidential. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public). Therefore, the requested information is not excepted from disclosure under section 552.101 of the Government Code in conjunction with article 39.14 of the Code of Criminal Procedure.

You also claim that the requested information is excepted from disclosure pursuant to section 552.101 in conjunction with the Texas Rules of Evidence. We note, however, that we generally do not address discovery and evidentiary rules that may or may not be applicable to information submitted to our office by a governmental body. *See* Open Records Decision No. 416 (1984) (finding that even if evidentiary rule specified that certain information may not be publicly released during trial, it would have no effect on disclosability under Public Information Act). Although you contend that the Texas Rules of Evidence constitute “other law” that makes the remaining submitted information confidential, we note that “[t]he Texas Rules of Civil Procedure and the Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). The submitted information does not fall into one of the categories of information made expressly public by section 552.022 of the Government Code. Therefore, the Texas Rules of Evidence are not applicable in this instance. Accordingly, we conclude that the department may not withhold any portion of the submitted information pursuant to section 552.101 of the Government Code in conjunction with the Texas Rules of Evidence.

Next, we address the department’s claims under section 552.103. Section 552.103 of the Government Code provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code § 552.103(a), (c). The department has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref’d n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103.

You represent to this office that the requested information relates to a pending DWI prosecution. You do not inform us, however, that the department is a party to the pending criminal litigation. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). In such a situation, we require an affirmative representation from the prosecuting attorney representing the governmental body that is a party to the litigation that he or she wants the submitted information withheld from disclosure under section 552.103. You have submitted a letter from an Assistant County Attorney for Brazos County, stating that his office is currently prosecuting the DWI case against John Wayne Schultz, III. The prosecutor states that “[t]he information being requested relates to our pending criminal litigation because it includes records related to the arrest for this individual for the alleged offense.” The prosecutor asks that the requested information be withheld from disclosure to protect his office’s position in the criminal prosecution.

We find that you have established that criminal litigation was pending when the department received this request for information. We also find, however, that only a small amount of the submitted information relates to the arrest of John Wayne Schultz, III and thus to the pending criminal litigation. *See* Open Records Decision Nos. 551 at 5 (1990) (attorney general will determine whether governmental body has reasonably established that information at issue is related to litigation), 511 at 2 (1988) (information “relates” to litigation under section 552.103 if its release would impair governmental body’s litigation interests). Therefore, based on your representations, the prosecutor’s letter, and our review of the information at issue, we conclude that the information that relates to the arrest of John Wayne Schultz, III is excepted from disclosure at this time under section 552.103. We have marked the information that the department may withhold.

In reaching this conclusion under section 552.103, we assume that the opposing party to the criminal case has not seen or had access to the marked information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information that relates to the pending litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, we address your claims under section 552.108 with regard to the remaining information. Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Similarly, section 552.108(b)(1) excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution.” A governmental body that raises section 552.108(a)(1) or (b)(1) must

reasonably explain how and why section 552.108 is applicable to the information. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

You contend that release of the requested information would interfere both with law enforcement and with the prosecution of the DWI. You assert that “[r]eleasing the communications allows the requestor to see how officers assist each other, how they respond to calls and also reveals their investigative techniques, thereby interfering with law enforcement.” You also assert that the requested information is related to the DWI prosecution because it involves Officer Patterson’s shift in which the DWI arrest took place. You state that the emails are “directly related to the pending prosecution because anything Officer Patterson did that evening as a College Station Police Officer will be under scrutiny in trial, especially since he is the State’s main witness.” You further assert that the remaining information relates to Officer Patterson’s credibility as a witness, competency to testify, and qualification as an expert witness. The prosecutor generally contends that the release of this information would interfere with the prosecution. However, these remaining messages do not relate to the pending DWI prosecutions. Furthermore, we find that the department has failed to show that the submitted information would interfere with law enforcement or crime prevention. Consequently, you have not demonstrated how or why the release of this information would interfere with the detection, investigation, or prosecution of crime. We therefore conclude that none of the remaining information is excepted from disclosure under section 552.108.

To summarize, (1) we have marked the information that must be withheld under section 552.103 of the Government Code; and (2) the remaining submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 178336

Enc. Submitted documents

c: Jim W. James
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(w/o enclosures)